No. 172.

Br. of Gilmore v. Miller for Def. in Error

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

Filed Dec. 27, 1899.

No. 172.

CITY OF NEW ORLEANS, PETITIONER,

versus

JOHN G. WARNER, RESPONDENT.

Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

BRIEF FOR PETITIONER ON RESPONDENT'S APPLICATION FOR A REHEARING.

Your Honors having granted respondent the right to file a petition and briefs for a rehearing herein, on the question of interest alone, it is deemed not improper by petitioner to lay before the Court its views upon this subject.

The Court has found in its opinion that there was no presentment of the warrants sued upon for payment, such as its terms and statute required; and that there was no waiver of such presentment. In the view of respondent, there is no basis afforded, either by the act of 1876, under

which the warrant was issued, or the contract made under its authority, for the allowance of any interest at all.

The provision of Sec. 3 of Act 16 of 1876 is that the warrants, in which the price of the purchase thereby authorized, was to be paid, "shall be issued in the same form and manner as those heretofore issued to the transferee of the said company, under Act 30 of the acts of 1871, for work done." It will be observed that Sec. 6 is silent as to the amount of price to be paid, also whether or not the same should bear interest, save so far as the item of interest may be imported into the contract by the reference to the act of 1871.

Turning to this statute we find that nothing is there provided as to the form of the warrant, save that it shall be drawn by the Administrator of Accounts on the Administrator of Finance, in such denominations as might be required by the president of the Canal Company. This is followed by the provision making it the duty of the latter official to pay the warrant on presentation to him, in case there be any funds in the city treasury to the credit of the Canal Company, but should there not be sufficient funds to cash the warrant the administrator is required to endorse upon the same the date of presentment, after which date the warrant should bear interest at the rate of 8 per cent. per annum, until paid. The concluding language of the section provides that this condition shall be set forth in the form of the warrant.

Under the law of Louisiana any obligation to pay conventional interest is invalid, unless evidenced by written agreement. Testimonial proof of the same is not permitted in any case. Revised Civil Code, Article 2924, paragraph 4.

Reid vs. Duncan, 1st La. An. 267.

Bayley & Pond vs. Stacey & Poland, 30 La. An. 1212.

The law requiring that the evidence of a promise to pay

interest must be in writing, it is a fair inference that the evidence relied upon must be clear, convincing and free from doubt. It is respectfully submitted that the ground upon which interest is herein claimed is not sufficient to sustain complainant's contention; the notarial act which shows price to be paid (see transcript, p. 100) is silent as to interest, the stipulation being simply that the sale is "made and accepted for and in consideration of the price and sum of $300,000, payable in drainage warrants;" ordinance 3539 (Trans. p. 104), authorizing the mayor to make the contract for the city, and fixing the price of the same, declares, "that upon the execution of the aforesaid notarial agreement, the Administrator of Accounts be, and he is hereby authorized and directed to warrant upon the Administrator of Finances for $300,000 in drainage warrants, in *full settlement*, as above provided;" the ordinance likewise containing no provision as to the payment of interest.

The only ground upon which the warrants could be considered as bearing interest would be that a stipulation for its payment properly enters into the "form and manner" of drawing them, as directed by Sec. 6 of the act of 1876; this however is borne out by the Record.

If there be any doubt whether or not petitioner is bound for the payment of interest on the warrants sued upon, this would be sufficient for it to go free from any obligation of that character, as by the express provisions of article 1957 of the Revised Civil Code, in a doubtful case the agreement is interpreted in favor of him who has contracted the obligation.

It seems reasonable to assume that if the Legislature contemplated that the price paid should bear conventional interest, which in the case of natural persons is never paid except where expressly stipulated, that it would have placed the matter beyond any doubt at all by following the invariable course in transactions between individuals, namely, by

providing in so many words that the price to be paid was to bear interest at a certain rate; it is only, however, by reference to the act of 1871, to ascertain in what form the warrants were to be drawn, that the matter of interest can be imported into the contract, if it has any place therein at all.

It will be noted that the Act of 1871 contains first, a direct positive and substantive declaration, that the warrants therein described are to bear interest at 8 per cent. from the date of their presentment for payment, and this is followed by the subordinate provision that this condition shall be set forth in the form of the warrant; it is difficult to understand why the Legislature, if it intended that the city should be charged with interest on the purchase warrants, that it should have left such intention to be understood by a mere reference in general terms to the form in which the warrants were to be drawn; this may have left many persons, at the time, under the impression that such an important feature of the contract was not intended to be left to interference or construction, and hence, wholly negative the allowance of any interest at all; especially so in view of the law of the state, which denies all conventional interest, where the same is not expressly stipulated in writing; to leave the discovery of an agreement to pay interest to a scrutiny of the form of the warrant, with no express reference by the Act of 1876, at all to the subject of interest, is not in harmony with the care and wisdom commonly attributed to legislators; the payment of the interest was no less important than the payment of the price itself, and in the present case, if interest be allowed from the day the warrants were presented, it would exceed by about one fifth the price itself; it would be more reasonable to interpret the "form and manner" of drawing the warrant, mentioned in Sec. 6 of the Act of 1876, as referring to what it would naturally mean; that is, the formal requisites of the warrant, as a means of ob-

taining the payment of public money, namely, that it should be drawn by the Administrator of Accounts on the Administrator of Finance; it should not be extended to such serious matters of substance as the payment, in the way of interest, of any amount beyond the price agreed on.

The law of Louisiana regarding an agreement to pay interest, as of such importance as to make its existence depend solely upon written evidence, it is fair to say that even where the evidence is in this form, it should be clear, convincing and free from doubt; the obligation to pay interest here is to be constructed from the language of a general reference to an act of the legislature, which provides that an express provision of that act requiring the payment of interest, shall be incorporated in the form of the warrant; in the Act of 1871 this provision as to the form of warrant follows the other substantial and independent declaration that interest shall be paid; the substantial and serious element is provided before the formal.

It will be observed that the right of the Administrator of Finance to make the endorsement of the date of presentation is conditioned upon their being no funds in the treasury available for its payment. It is only as a consequence of this fact that he has any authority to make the endorsement. Its existence or nonexistence is jurisdictional, and the endorsement in any event should recite the fact which is a condition precedent to any right to make it.

Respectfully submitted,

SAMUEL L. GILMORE,

City Attorney.

BRANCH K. MILLER,

Solicitors for the City of New Orleans, Petitioner.

DECEMBER, 1899.

No. 640. 172

Assignment of Errors.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1898.

Filed Mar. 14, 1899.

No. 640.

THE CITY OF NEW ORLEANS, PETITIONER,

vs.

JOHN G. WARNER.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

ASSIGNMENT OF ERRORS.

First. That the United States circuit court of appeals for the fifth circuit is and was without jurisdiction to hear and determine this cause; that the case involves the construction and application of the Constitution of the United States, especially section 10 of article 1, and also the fourteenth amendment thereof, prohibiting all legislation impairing the obligation of contracts, as is shown by the averment of complainant contained in the twenty-fourth paragraph of his bill.

That, independent of the said averment, this case is one which involves the construction or application of the Constitution of the United States.

That in this case certain laws of the State of Louisiana

are claimed to be in contravention of the Constitution of the United States, to wit, that by the said twenty-fourth paragraph of complainant's bill it is averred that the act of the General Assembly of the State of Louisiana, No. 48 of the year 1877, excluding certain lands from all liability for drainage taxes and canceling and annulling all judgments for the drainage of said lands, and the legal proceedings pending therefor, and the act of the General Assembly of the State of Louisiana, No. 67 of the year 1877, declaring that no judgment for drainage taxes should be collected until the property had been benefited to an extent equal to the drainage taxes imposed, and section 42 of act No. 20 of the General Assembly of the State of Louisiana for the year 1882, by which all laws providing for the drainage of the city of New Orleans or portions thereof and the collection of drainage-tax assessments are unconstitutional, null, and void, because repugnant to the Constitution of the United States, especially section 10 of article 1 and the fourteenth amendment of that Constitution, prohibiting all State legislation impairing the obligation of contracts and protecting the rights of property.

Second. That the court erred in holding that all of the defenses set up in the answer had been ruled upon adversely by the Supreme Court in the case of John G. Warner *vs.* City of New Orleans, reported in 167 U. S., page 467.

Third. That the court erred in holding that the only fact in dispute between the parties is the question of responsibility for the alleged defects in the drainage plans; that the answer shows that there are other distinct issues made here which formed no part of the pleadings when the demurrer was heard, namely, the non-liability of the city for assessments against streets, public squares, and property of a like character, the effect of the amendment to the constitution of the State of Louisiana of 1874, and the plea of prescrip-

tion and *res judicata;* that while the case of Peake *vs.* City of New Orleans was pleaded in the demurrer as *res judicata* of the present case, the showing on the demurrer in this respect was widely different from that made at present, namely, the record of the Peake case on the demurrer was not before the court, the plea could only be sustained by evidence, and hence the court could on the demurrer have no knowledge of its scope. In any event, the part of the case of Peake relied upon to sustain the plea of *res judicata* was the intervention of James Jackson and the plea therein, which could by no process whatever be brought to the notice of the court on the demurrer, in consequence of which the overruling of the demurrer cannot be considered as overruling the plea of *res judicata.*

Fourth. That the court erred in holding that the defects in the drainage plan were attributable to the fault of the city.

Fifth. That the court erred in holding that the city was trustee as to the so-called assessments and judgments therefor against streets, squares, and public property of a like character.

Sixth. That the court erred in holding that the city, by drawing warrants against the drainage fund, was estopped to deny the existence and validity of the said assessments against public property, and if the court intended to hold, independent of the estoppel it declares, that the said assessments on streets, public squares, and property of a like character were valid, or were made by any authority of law, or had any binding effect against the city, it also erred in this regard, and if it reached the conclusion that any validity or binding force was given to said assessments by the judgments of homologation set out in the bill, it also erred.

Seventh. That the court erred in finding that the cases of The New Orleans Drainage Co., 11 An., 338; Marquez *vs.* City of New Orleans, 13 An., 319; Correjolles *vs.* Succession of Foucher, 26 An., 362; Barber Asphalt Paving Co. *vs.* Gogreve, 41 An., 259, were any authority on the question of the liability of public property to local assessment, or that the decision of those cases had any controlling or other influence on the issues involved here; likewise as to the case of McLean *vs.* City of Bloomington, 106 Ill., 209.

Eighth. That the court erred in holding that the assessments on said public property constituted a lawful debt of the city, which must be discharged by the exercise of the power of taxation.

Ninth. That the court erred in holding that the constitutional amendment of 1874 was not a complete defense to this suit; that while the said amendment permitted the issue of drainage warrants, the same, by the express terms of the amendment as to their payment, were restricted to drainage taxes alone, the same amendment allowing this mode of payment, "and not otherwise." This was an express denial of any power in the city, by any process whatever, to become the absolute debtor of the said warrants; and in any event the proviso of the amendment as regards the drainage warrants extended no farther than to those issued under act No. 30 of 1871, and by no interpretation could be held to include warrants issued under the subsequent act, No. 16 of 1876; that the said assessments against public property were not confirmed by act No. 30 of 1871, such confirmation as may have been given by said act having reference exclusively to assessments against private property; that the authority to draw drainage warrants allowed by the amendment does not imply, as is declared by the court, an affirmance either of the validity of the assessments against streets

and other public property or of the right of the city to proceed to the completion of drainage work then in progress, the said work at the time of the adoption of the amendment being exclusively in the hands of Van Norden, transferee of the Mississippi and Mexican Gulf Ship Canal Company, to the doing of which the city had no relation whatever, and to which it was a perfect stranger until its purchase under the act of 1876, some two years and a half after the amendment was adopted; that the city was absolutely without power to increase her debt by the purchase of 1876 or by any of the consequences thereof, and the effect of the constitutional prohibition could not be avoided by an error of law or otherwise.

Tenth. That the court erred in overruling or refusing to maintain the plea of prescription as to the assessments against public property and the judgments homologating the same; that as to these the city was not a trustee, but at most, under complainant's contention, a mere debtor, and even this is distinctly denied by defendant; that whether or not the said assessments and judgments are prescribed is to be determined by the law of prescription in the State of Louisiana; that the statutes of limitations of the several States and the interpretation given them by the highest court of the State in question are binding as rules of decision in the Federal courts; that the laws of prescription of the State of the Louisiana and their construction given by the supreme court of this State, so far as they operate as a release from debt, depend for their application solely upon the lapse of time required; that good faith or bad faith, trusteeship, or other like matters are not considered. The mere passing of the time of the statute, without further condition, constitutes a complete defense. Hence, even if the city, as erroneously held by your honors, was a trustee, the plea of prescription as against the said assessments against public property and the judgments therefor should

have been maintained; that the case of Insurance Company *vs.* Pike, 32 An., 483, is wholly inapplicable to this case, as concerns the said assessments against public property and the judgments therefor; that the city has not averred in its answer that it has constantly endeavored by suits and otherwise to collect these assessments, but, on the contrary, the answer expressly denies that they had or ever had any validity or binding force; that the averments of the collection and accounting for taxes set up in the answer are limited in terms to the assessments against private property; therefore the conclusion of the court that the city by its efforts to collect has affirmed the trust as to the assessment against herself is error; that the city does not plead her own neglect to have kept the judgments against herself alive by bringing suits for their revival; that as a matter of fact she could not have done so, it being in law inconceivable that she as a plaintiff could bring a suit against herself as a defendant to revive a judgment against herself; that this would not leave complainant without a remedy, as by article 3547 of the Revised Civil Code any person interested in a judgment may bring a suit for its revival; so that it is the warrant-holders and not the city who have allowed the said judgments to prescribe. The city was absolutely without power to revive them, while the warrant-holders were free to have done so. In consequence of this and other considerations the cases of the Succession of Farmer, 32 An., 1037; McKnight *vs.* Calhoun, 36 An., 408, to the effect that the prescription of debts due by a succession to its administrator and *vice versa* is suspended, while the administration continues, are without application here; that whether or not the assessments as originally made are subject to prescription, and defendant insists that they are, they have, by the averment of complainant, passed into judgments, and by merger have lost their original character. That the judgments are subject to prescription is apparent from the textual provisions of article 3547, Revised Civil Code, the case of Reed *vs.* His

Creditors, 39 An., 115, citing State *vs.* Jackson, 34 An., 178, and Davidson *vs.* Lindop, 36 An., 767, construing, as they do, the particular provisions of special statutes presenting no feature in common with those presented here; the statutes interpreted by those cases differing *in toto* from those involved here, expressly provide that the taxes levied thereunder shall not be subject to prescription, and hence furnish no authority upon the question of prescription here at issue."

Eleventh. That the court erred in holding that the only remaining consideration which required its consideration, after having disposed of those preceding, was that of prescription; that defendant, besides the other defenses, had pleaded *res adjudicata*, based upon the opinion and decree of the United States Supreme Court and of the circuit court for the fifth circuit and eastern district of Louisiana in the case of James W. Peake *vs.* City of New Orleans, No. 11614 of the docket of the latter. The opinion of the Supreme Court in such cause is found in 139 U. S. Reports, page 323. (See Record, pages 22 and 23.) The opinion of the court did not dispose of this defense; it was not considered. It should have been maintained as a bar and defense to this suit.

Twelfth. That the court erred in holding that the city should not be allowed in any event the amount of its bond issue, described in the answer as a credit in her favor, on any amount which she might hereafter be decreed to owe; that while it has been held by the Supreme Court that the bond issue could not be so treated, the opinion of the Supreme Court was based upon the question submitted for its consideration in this respect, which was made up from the record of the case as it then stood, namely, on an answer and a demurrer. The record at that time necessarily did not and could not make the showing of facts which is now before the court, namely, that Van Norden, the vendor of the city,

received, either himself personally or through his employés, assignees, or transferees, the entire issue of the bonds, and hence could not plead ignorance of the fact that the drainage fund had been augmented to the extent of the issue of bonds; that this would remove the element of ignorance on his part necessary to constitute an estoppel as against the city; that while the finding of the Supreme Court that the bond issue could not be treated as a defense was on the demurrer, it does not extend to the exclusion of such defense under the evidence now disclosed by the record. The bill does not even aver that Van Norden was ignorant of the issue of bonds, but that he did not understand that its legal consequence was a diminution of the outstanding drainage fund, and that he did not anticipate at the time of the purchase that the city would make such claim. This, at most, would be an error of law, a lack of correct judgment as to the legal consequences of a certain act, against which the laws of Louisiana does not relieve.

It should be noted also that what the Supreme Court said was based only upon the status of the bond issue, as shown by your honors' certificate, and not by the averments of the bill, the former being much narrower than the latter.

Thirteenth. That in Peake *vs.* New Orleans, 139 U. S., 342, the Supreme Court held that the city had the right to abandon the work of drainage; that such an abandonment was no cause of liability to warrant-holders; that while the opinion was with reference to work or construction warrants, it is equally applicable to the purchase warrants sued on herein, and that the city should be exonerated from any liability based on the ground of the abandonment of said work, and in failing to give effect to this ground of the defense the court erred.

Fourteenth. That the court erred in holding that the city of New Orleans was a debtor of John G. Warner, the com-

plainant, in the sum of six thousand dollars, with eight per cent. interest, from January 6, 1876, or in any sum whatever.

Fifteenth. That the court erred in decreeing that the drainage assessments, including those against the defendant as assessee of streets, squares, and public places, as well as those against the owners of private property, constituted a trust fund in the hands of the city for the purpose of paying the claims of complainant and other holders of the same class of warrants issued under the act of sale from Warren Van Norden, transferee, to said city, under the authority of act 16 of the legislature of the State of Louisiana, approved February 24, 1876.

Sixteenth. That the court erred in holding that the city in any mode should be held to account for assessments of drainage taxes against streets, public squares, public places, or other property of a like character; that the court erred in decreeing that no offset should be allowed the city in any event for bonds issued in exchange for drainage warrants under the act of 1872.

Seventeenth. That the court erred in decreeing that complainant and those who had established their claims under the fourth clause of the decree would be entitled to an absolute decree against the defendant under any conditions.

Eighteenth. That the court erred in failing to give due effect to the appointment of a receiver for drainage taxes. This suit, if otherwise well founded, which is denied, should be directed against said receiver, and not against the defendant.

Nineteenth. That the court erred in not holding that the acts of the General Assembly of the State of Louisiana, Nos. 48 and 67 of 1877 and section 40 of act No. 20 of 1882, were full and complete authority and justification of the city of New Orleans for having abandoned the work of drainage, and also a full defense to the liability asserted in this suit against her for any non-collection of drainage taxes.

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